82987-0

NO. 82987-0
C/A NO. 26462-9-III

STATE OF WASHINGTON,
Respondent,

v.

DANIEL ROSS HUWE,
Petitioner.

APPEAL FROM THE SUPERIOR COURT
OF COLUMBIA COUNTY
THE HONORABLE WILLIAM D. ACEY

PETITION FOR REVIEW
"AMENDED"

Daniel R. Huwe
D.O.C.#804545,Petitioner
Red Rock Correctional Center
1750 E. Arica Rd.
Eloy,Arizona 85131

A. **Identity of Petitioner**

Daniel Huwe,appellant in the Court of Appeals,asks this Honorable State Supreme Court to accept review of the Court of Appeals decision terminating review designated in Part B.

B. **Court of Appeals Decision**

The Unpublished Decision entered March 10,2009,which affirmed Petitioner's Conviction.Petitioner believes that the Court of Appeals overlooked the law in mis-applying authorities in reaching their Decision.A copy of the Decision is provided.

C. **Issues Presented for Review**

1. The trial Court ordered that a seating of the jury for Mr. Huwe's trial would be jurors from Walla Walla County and then hold the trial in Columbia County.Did the trial court violate Mr. Huwe's Constitutional right to be tried by an impartial jury of the county in which the offense charged to have been committed?

2. Defense Counsel asked the trial court to order that Mr. Huwe remain in the Columbia County Jail during the course of trial rather than transport him back and forth to the Walla Walla State Prison.Did trial court err in not ordering Mr. Huwe to be held in the Columbia County Jail?

3. The trial court ordered that the domestic violence instruction and the zone of privacy instruction be given to the jury.Did the trial court err in giving those instructions?

4. The trial court gave the good samaritan instruction to the jury.Did the trial court err in giving the good samaritan instruction to the jury?

5. The prosecutor told the jury that it would make more sense to either find Mr. Huwe guilty of murder in the second degree and assault in the first degree or none of it.Was it Misconduct by the prosecutor in leaving the

jury with a false choice?

6. The prosecutor asked Mr.Spray if he thought the defendant was joking when he said "he was going to end this tonight". And the Prosecutor asked Officer Franklin if Ms.Donohue was right and correct in her answering where she resided.Was it Misconduct by the prosecutor in eliciting opinion testimony that went to the veracity of another witness?

7. The prosecutor stated that the defendant had had a few guns in the past.Was it misconduct by the prosecutor to refer to extraneous information?

8. The prosecutor stated that Mr.Huwe is the type of person that doesn't have the guts to make the call and say that he shot someone.Was it misconduct by the prosecutor when commenting on Mr.Huwe's Constitutional right to remain silent?

9. The prosecutor elicited from witness of prior bad act and of prior trial.Was it misconduct by the prosecutor when it was done in direct violation of Motion in Limine?

10. Trial Counsel elicted further inadmissible testimony from a witness. Did trial counsel render Ineffective Assistance of Counsel?

11. Trial Counsel failed to object to the admission of booking room photographs of the defendant.Did trial counsel render Ineffective Assistance of Counsel?

12. The prosecutor,Rea Culwell worked with one of the victims in this case,Public Defender,Ms.Cathlin Donohue.Did the Trial Court err in failing to disqualify the Columbia County Prosecutor's Office or to appoint an independent special counsel?

13. The Trial Court was overseer of the Columbia County contract with Public Defender Cathlin Donohue,who is one of the victims in this case. Did the Judge deny Mr.Huwe of his Constitutional rights to due process of

law and to a fair trial by refusing to disqualify himself from Mr.Huwe's case?

14. There was insufficient evidence of intent to kill or assault in this case to satisfy proof beyond a reasonable doubt standard therefore denying Mr.Huwe of his Constitutional rights to due process and a fair trial.Should Mr.Huwe's convictions be set aside and remand for new trial?

15. Does the Cumulative Effect apply?

"CITATIONS TO THE REPORT OF PROCEEDINGS SHALL BE REFERRED TO BY DATE AT THE BEGINNING OF CITATION AND SHALL CONTINUE ON OF THAT CITED DATE UNLESS OTHERWISE CITED AS A DIFFERENT DATE".

D. Statement of the Case

August 21,2007 Cathlin Donohue testified that on June 12,2002 she picked up the defendant at the baseball field.RP 15 At her house an argument ensued. RP 17 She testified that the defendant retrieved gun from bedroom, she had told him where the gun was.RP 25 Lenore Lawrence came over and demanded entrance into the house.RP 30 Lenore came in and got in Mr.Huwe's face, confronted him while Mr.Huwe and Cathlin were sitting on the couch.RP 34-35 Cathlin testified that Mr.Huwe shot Lenore twice.RP 36 Then shot Cathlin through the tigh.RP 37 Then he went down the hall and seen Lenore,and Mr.Huwe gasped,then went and called 911; said "two people down".RP 40 Cathlin said Mr.Huwe was very intoxicated.RP 71 August 27,2007 The jury finds Mr.Huwe guilty of murder in the second degree and assault one and armed with a firearm RP 640 August 30,2007 Mr.Huwe was sentenced to 463 months total confinement. RP 42

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. TRIAL COURT DENIED MR.HUWE OF HIS CONSTITUTIONAL RIGHT TO BE TRIED BY A JURY OF THE COUNTY IN WHICH THE OFFENSE IS CHARGED TO HAVE BEEN COMMITTED.

August 8,2007 Trial court orders that a seating of the jury for Mr.Huwe's trial will be jurors from Walla Walla County and then hold the trial in Columbia County.RP 18-19 Columbia County is where the alleged offenses were

committed.Columbia County Cause No.02-1-00022-9

Article 1 Section 22 of the Washington State Constitution provides that the accused in a criminal case is entitled to have a speedy public trial by an impartial jury of the county in which the offense charged to have been committed.see State v. Carroll,55 Wash.588, 104 P.814(1909) and also State v. Twyman,143 Wn.2d 115, 17 P.3d 1184(2001) A change of venue to another county cannot be ordered unless the defendant waives his constitutional right to be tried in county where offense was committed.State v. Superior Court of Pacific County,88 Wash.669, 153 P.1078(1915) Mr.Huwe's case is not one where he waived this right.A waiver has to be knowingly and intelligently made just like waiving any other Constitutional rights.Mr.Huwe's case is distinguishable from that of Detention of Lewis,134 Wash.App.896, 143 P.3d 883(Div.III 2006)where the court held the trial court properly ordered change of venue on its own motion after defendant tainted jury pool. Here in Mr.Huwe's case there was no taint of the jury.Columbia County would have been the proper venue for Mr.Huwe's jury to been seated from and there was not any questions as to impartiality by the trial court,just disregard for Mr.Huwe's Constitutional rights.

State v. McCorkell,63 Wn.App.798, 822 P.2d 795(1992) does not apply here. Mr.Huwe is not challenging proof of venue but constitutional right to be tried by jury of Columbia County.

August 22,2007 The juror that lives in the town of Dixie who seen Mr.Huwe being transported in the Department of Corrections van RP 144 could said to have been a direct result of trial court ordering jurors from Walla Walla County be brought to Columbia County to try the defendant. The United States Supreme Court said in Gut v. State of Minnesota,76 U.S. 35 that undoubtedly the 6th Amendment right,to have a jury of the district in which the crime is committed is of the highest importance.

August 24,2007 The prosecutor in closing stated it's probably been inconvenient for you to be bused from Walla Walla,but I think you also realize how terribly important this case is, and I know you are going to take it with that importance.RP 576 By way of that it could be said that the prosecutor was insinuating that cases where a jury is took from one county to another are more important cases and that should be remembered when deliberating.

"It is the Constitutional right of the citizen to be tried in the district in which the offense imputed to him is alleged to have been committed,and not elsewhere.As was said by the Supreme Court in Salinger v. Loisel265 U.S. 224,232, 44 S.Ct. 519,522, 68 L.Ed. 989 "It must be conceded that under the Sixth Amendment to the Constitution the accused cannot be tried in one district on an indictment showing the offense was not committed in that district,and it also must be conceded that their is no authority for a removal to a district other than one in which the Constitution permits the trial to be had".

The trial court denied the defendant his Constitutional right to be tried by a jury of the county where the alleged offenses committed thats guaranteed him under Article 1§22 of the Washington Constitution and 6th Amendment of the United States Constitution.Mr.Huwe's convictions should be reversed and a new trial ordered.

2. TRIAL COURT ERRED IN NOT ORDERING MR.HUWE TO BE HELD IN COLUMBIA COUNTY JAIL DURING THE COURSE OF HIS TRIAL.

August 8,2007 Defense counsel asks court to order that Mr.Huwe remain in the Columbia County Jail during the course of his trial rather than transport him back and forth between counties.RP 85-86 The trial court didn't have any objection to

that if the sheriff doesn't.RP 86 August 17,2007 The trial court rules that Mr.Huwe not to be manacled or shackled in any manner whatsoever in his retrial Trial court intends to bus in Walla Walla County jurors to Columbia County everyday.RP 10,37 August 22,2007 The juror that lives in Dixie seen Mr.Huwe being transported,the guy the juror was with gestured as if he recognized Mr.Huwe,they had a discussion after that.Trial court states that juror was being picked up there and brought by the bus to the trial.RP 144

The court's duty to shield the jury from routine security measures used in a criminal trial is a constitutional mandate-14th Amendment.State v. Gonzalez,129 Wn.App.895,120 P.3d 645(Div.III 2005)Trial court did not take precautionary measures in letting the juror be picked up on the same route D.O.C. took with Mr.Huwe.August 17,2007 Trial court had ordered transport officers(DOC) to be in plain cloths.RP 21 But yet he never enforced it.August 22,2007 Trial court states "I've got two uniformed officers in court with white "DOC" written across their chests.The cat is out of the bag,as far as where Mr.Huwe is spending his evenings,during trial.RP 145

> Court's from other states have held the right to a fair trial is violated by mere reference to a defendant's incustody status. see e.g.Haywood v. State of Nevada,107 Nev.285,288, 809 P.2d 1272(1991)

Mr.Huwe should have been held in Columbia County Jail awaiting trial like similar situated individuals.Mr.Huwe was denied his right to presumption of innocence,right to due process,right to a fair trial by an impartial jury and denied his right to like treatment under the U.S. Constitution by the 5,6, and 14th Amendments and Article 1 Section 3,9,12, and 22 of Washington's Constitution.Mr. Huwe's conviction should be reversed and remand for a new trial or at the least an evidentiary hearing to determine the affect of the sighting upon the mind of the juror.

3. TRIAL COURT ERRED IN GIVING THE "ZONE OF PRIVACY JURY INSTRUCTION."

August 24,2007 Trial court orders the domestic violence and the Zone of

of Privacy Instruction be given to the jury.RP 498-499,501 and RP 530 August 27,2007 Question from the jury in their deliberations "What is a Zone of Privacy?"RP 634 August 27,2007 The jury returned verdict that Mr.Huwe and Ms.Donohue were members of the same household.And that Mr.Huwe invaded her zone of privacy.RP 642 Mr.Huwe disagrees and contends that both of these verdicts cannot be found together.If Cathlin and Mr.Huwe were members of the same household,he can't have invaded her zone of privacy,they shared zones of privacy.August 21,2007 Cathlin testified that Mr.Huwe had access to all her belongings.RP 92 Mr.Huwe believes the legislators intended that zone of privacy aggravating factor be more than just a finding of being unwanted in someone's home.see e.g.

> State v. Jerde,93 Wn.App. 774, 970 P.2d 781(Div.II 1999) an aggravated factor was found,an invasion of the "zone of privacy" of the victims,because it was committed in their home-defendant knew the particular vulnerability of the occupants they were wheel chair bound occupants.

The "Zone of Privacy" instruction was improperly given in Mr.Huwe's case.It definitely affected the jury's verdict,they struggled with what a zone of privacy is.Mr.Huwe was denied his constitutional rights of due process and a fair trial by an impartial jury.Mr.Huwe's convictions should be reversed and remanded for a new trial.

4. TRIAL COURT ERRED IN GIVING THE "GOOD SAMARITAN" INSTRUCTION TO THE JURY. August 24,2007 Defense objects to the giving of the Good Samaritan instruction RP 492 The facts of this case are that the victim that responded was well aware that there was a danger and was not responding to aid Mr.Huwe but actively ad affirmatively engaged in confrontation with Mr.Huwe rather than a person of trust.RP 496 Trial court overruled the objection and gave the instruction.RP 498 The tril court did not follow the law when he gave the Good Samaritan jury instruction

> In State v. Hillman,66 Wn.App.770, 832 P.2d 1369(Div I 1992) the court found that Good Samaritan applys to cases where a person comes to the aid of another person and then is senselessly killed or attacked "by the [p]erson he or she is attempting to aid".A special

> relationship that arises when one person comes to the aid of another There is a trust established between the parties on the basis of one person helping another,the victim is vulnerable because a person giving help does not anticipate danger from person receiving aid.

The trial court here in Mr.Huwe's case had the definition before him,it was shown that it shouldn't have been given to the jury,yet he did anyways. The instruction confused the jury.August 27,2007 The jury asked if they have to answer verdict form 4 "Was Lenore Lawrence acting as a good samaritan, when the defendant committed the crime Murder 1, Manslaughter 1 or 2?RP 638 The jury found that Ms.Lawrence was not acting as a good samaritan.RP 641 The giving of the instruction where it was not warranted by the evidence was err and very well could have affected the jury's verdict.Giving the instruction diverted the attention of the jury where as they could hace been more focused on the greater issues at hand had the instruction not been given.Mr.Huwe was denied his constitutional rights to due process and a fair trial by an impartial jury.Those rights provided by the 5,6,and 14th Amendments of the U.S. Constitution and guaranteed by Article 1 Section 3 and 22 of the Washington Constitution.Mr.Huwe's conviction should be reverse and remanded for a new trial.

5. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENT FOR LEAVING THE JURY WITH A FALSE CHOICE.

Prosecutor says to the jury"I am going to ask you-I am going to suggest to you that it would make more sense for you to just let the defendant go.It would make more sense to either find him guilty of murder 2,and assault 1 or none of it."RP 573 August 24,2007 The jury was instructed on lesser includeds on both counts Manslaughter 1 and 2 and 2nd and 3rd degree assault. RP 549-555 The prosecutor negated the lesser included offenses by appealing to the jury's emotions by way of suggesting a false choice of law.The prosecut -or effectively suggested to the jury to ignore what the judge instructed you on,don't consider the lesser included offenses,either as charged or

none of it.The theory argued to the jury was not covered in the instructions nowhere in the instructions did it say the jury could find the defendant guilty of murder 2 and assault 1 or none of it.It is highly probable that the jury followed these false instructions given by the prosecutor,seeings how they found Mr.Huwe guilty of Murder 2 and assault 1.

> In State v. Becklin,133 Wn.App.610, 137 P.3d 882(Div.III 2006)the court found that counsel may argue all issues and theories covered by the instructions,but may not argue theories not covered by the instructions.

Mr.Huwe was denied his constitutional right to a fair trial by an impartial jury guaranteed by the 6th Amendment U.S. Constitution and Article 1 Section 22 of Washington State's Constitution.

6. PROSECUTORIAL MISCONDUCT FOR ELICITING OPINION TESTIMONY THAT GOES TO THE VERACITY OF ANOTHER WITNESS.

August 21,2007 Mr.Spray testified the defendant said "He was going to end this tonight." The prosecutor asked him if he thought the defendant was joking,when he said that?Mr.Spray testified that he thought Mr.Huwe was contemplating suicide.RP 107 The prosecutor in effect asked Mr.Spray if Mr.Huwe was telling the truth in regards to that statement.

> Generally;no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant;such testimony is unfairly prejudicial to the defendant "because it invades the exclusive province of the [jury]."City of Seattle v. Heatley,70 Wash.App.573,577, 854 P.2d 658(1993)citing State v. Black,109 Wash.2d 336,348, 745 P.2d 12(1987)see also ER 608 quoted by State v. Demery,144 Wn.2d 753, 30 P.3d 1278(2001)

August 8,2007 Trial court ruled that Cathlin's former boyfriends suicide is inadmissible.RP 67-68 August 21,2007 Mr.Spray testified that Cathlin was back in town because of her boyfriend's suicide.RP 106 That response alone was so highly inflammatory and prejudicial that no instruction could take that from the minds of the jury.Mr.Spray on direct examination says he and Mr.Huwe had discussed if Mr.Huwe had been staying out of trouble.The prosecutor in front of the jury responds by saying without talking about any response or further comment.RP 106 The court should take note of

State v. Boehning,127 Wn.App.511, 111 P.3d 899(Div.II 2005)the court said the prosecutor left the jury with the impression that witnesses had more knowledge that was favorable to the State.

The prosecutor did something similar here in Mr.Huwe's trial to that of Boehing Leaving the jury to speculate as to whether or not Mr.Huwe had done prior unlawful acts,when the prosecutor directed Mr.Spray not to talk about it.August 22,2007 The prosecutor's question to Captain Franklin about what Cathlin's address was?He testified Cathlin said "St.Mary's" Then the prosecutor asks him technically she was at St.Mary's.Officer responds "Yes,she was" Then the prosecutor asks to officer "so in your letter of your question to her,she was right in her residing at St.Mary's,so technically that was correct.Did you want more information from her?Franklin testifies yes and she gave that information to him.RP 242 The trial court excused the jury for a while and notes that the prosecutor effectively asked the witness to comment on the veracity of another witness and said that is impermissible, warns not to do that again.RP Nothing was done to try and cure the error.

The Carlin,40 Wash.App.at 703, 700 P.2d 323 court noted that when a law enforcement officer gives opinion testimony the jury is especially likely to be influenced by that testimony.An officer's live testimony offered during trial,like a prosecutor's statements made during trial may often "[carry] an '"aura of special reliability and trustworthiness'" U.S. v. Espinoza,827 F.2d 604,613(9th Cir,1987);quoting U.S. v. Young, 745 F.2d 733,766(2nd Cir.1984);quoting U.S. v. Fosher,590 F,2d 381

It could very well be said that it was suggested to the jury that because Cathlin was truthful in answering where she resided that the officer was also assuring the jury that all the information was correct because he said she gave it to him.August 24,2007 Combined with the prosecutor in closing told the jury "We absolutely do know what happened "Then told the jury don't just assume that Cathlin was wrong in saying there was 5 shots.RP 607 The state went on to say"So you know,it's entirely possible that Cathlin is exacly right.RP 608 Mr.Huwe was denied his constitutional right to a fair trial by an impartial jury that is guaranteed by the 6th and 14th Amendments

of the U.S. constitution and Article 1 Section 22 of the Washington.Mr. Huwe asks this court to reverse his convictions and remand for a new trial.

7. PROSECUTORIAL MISCONDUCT IN REFERRING TO EXTRANEOUS INFORMATION.
August 21,2007 In the State's objection states that they have established that the defendant has had a few guns in the past, and a rifle.RP 60 The state by way of introducing comments that are unsupported by the evidence effectively put before the jury extraneous information.There had been no evidence introduced into Mr.Huwe's trial about him owning or possessing any guns exept the one in this incident.Clearly the prosecutor made this statement with the knowledge that the comment was false.The error was prejudicial.

> A prosecutor may not make statements that are unsupported by the evidence and prejudice the defendant.State v. Boehning,127 Wn.App.511,(2005)

The prejudice in effect denied Mr.Huwe his constitutional right to a fair trial by an impartial jury guaranteed by the 6th Amendment of the U.S. Constitution and Article 1 Section 22 of the Washington Constitution.The court should reverse Mr.Huwe's conviction and remand for a new trial.

8. PROSECUTORIAL MISCONDUCT IN CLOSING ARGUMENTS ON MR.HUWE'S SILENCE
August 24,2007 The prosecutor in closing arguments says "What kind of person calls for an ambulance?"RP 614-615 "Well,I will tell you,its the kind of person that won't give his name will say it doesn't matter who did this.He is the type of person that doesn't have the guts to make the call and say I shot someone.He is the kind that doesn't want to be held responsible for his actions.RP 615 You know,we know what happened,we know the defendant got a gun and killed Ms.Lawrence and shot Cathlin.RP 565

> The state may not elicit comments from a witness or make closing arguments relating to the defendant's silence to infer guilt from such silence.U.S. Constitution Amendment 5 State v. Easter,130 Wn.2d 228, 922 P.2d 1285(1996) The state here in Mr.Huwe's case did exactly that

commenting on his silence.The prosecutor states he wouldn't give his name, followed up by the highly inflammatory comment "He is the type of person that doesn't have the guts to make the call and say he shot somebody.RP615

The 5th Amendment applies before a defendant is in custody or is subject of suspicion or investigation.State v. Easter,130 Wn.2d 228, 922 P.2d 1285(1996)the 5th Amendment of the U.S. Constitution states in part, no person "shall...be compelled in any criminal case to be a witness against himself.This provision applies to the states through the 14th Amendment.Malloy v. Hogan,378 U.S. 1, 84 S.Ct. 1489, 12 L.Ed.2d 653(1964) The Washington State constitution Article 1 Section 9 states "[n]o person shall be compelled in any criminal case to give evidence against himself." The U.S. Supreme court said in Miranda, "[t]he prosecution may not...use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation."Miranda,384 U.S. at 468 n37, 86 S.Ct. at 1264 n.37 An accused's 5th Amendment right to silence can be circumvented by the state "just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.State v. Fricks,91 Wash.2d 391,396, 588 P.2d 1328(1979) The purpose of the right to silence is to make the government obtain evidence on it's own, and to spare the accused from having to reveal directly or indirectly,his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the government." John Doe v. United States,487 U.S. at 213, 108 S.Ct. at 2349

This misconduct of the prosecutor in Mr.Huwe's trial was so flagrant and ill-intentioned that no instruction could obviate the prejudice engendered by it.

see State v. Monk,42 Wash.App. at 325, 711 P.2d 365(1985)(exception to the rule of having to object to a prosecutor's argument)Reasoning which sustains both the prohibition against comment upon constitutional privilege against self-incrimination,is that the State cannot and will not be permitted to put forward an inference of guilt,which necessarily flows from imputation that accused has suppressed or is withholding evidence,when by constitution he is simply not compelled to produce the evidence.State v. Charlton,90 Wn.2d 657, 585 P.2d 142(1978)

The prosecutor's comment "He is the type of person that doesn't have the guts to make the call and say that "He shot somebody."RP 615 Was definitely a comment aimed at inflaming the jury thus prejudicing the defendant.The error of commenting on Mr.Huwe's silence by the prosecutor is presumed to be prejudicial.

An error infringing upon a defendant's constitutional rights is presumed to be prejudicial and the state has the burden of proving harmless.State v. Miller,131 Wash.2d 78,90, 929 P.2d 372(1997);citing State v. Caldwell 94 Wash.2d 614, 618 P.2d 508(1980)The error cannot be declared harmless unless harmless beyond a reasonable doubt.Millerat 90

Mr.Huwe was denied his right to a fair trial by an impartial jury because his constitutional right to remain silent was used against him.These rights of the 5,6, and 14th Amendments are guaranteed under the U.S. Constitution and Article 1 Section 3,9,22 of the Washington Constitution.Nothing short of a new trial will remedy this error by the state in Mr.Huwe's trial.

9. PROSECUTORIAL MISCONDUCT IN ELICITING TESTIMONY FROM WITNESS OF PRIOR BAD ACT AND ELICITING TESTIMONY FROM A WITNESS OF PRIOR TRIAL BOTH IN DIRECT VIOLATION OF MOTIONS IN LIMINE.

"The purpose of a motion in limine is to dispose of legal matters so counsel will not be forced to make comments in the presence of the jury which might prejudice his presentation."State v. Kelley,102 Wash.2d 188,193, 685 P.2d564 August 8,2007 Incident number 7 one month before the shooting,Ms Donohue borrowed a gun and ammunition from,Mr.Krouse.RP 11 Judge rules prior bad acts 1-8 are inadmissible.RP 79 August 21,2007 In direct examination of Ms.Donohue asks what .38 special?She responds the 38. she borrowed from Krouse RP 25-26 The state asks "When did you borrow it?"She responds "a month before this incident."Why did you borrow it?" Cathlin responds "she was afraid for her safety."who were you afraid of?Cathlin's response "Mr.Huwe" RP 26-27

> In State v. Montague,31 wn.App.688, 644 P.2d 715(Div.III 1982)held that the prosecutor's question which alluded to a prior rape investigation was improper and prejudicial.The court reversed his convictions and remanded for a new trial.

Even if the state persuades the court that the testimony complained of had any bearing upon the facts in regards to the charge of assault 1 it certainly had no bearing upon the crime of murder 2.These prior bad acts were alleged to have been committed against Cathlin Donohue,not Ms.Lawrence.In fact there has been no evidence whatsoever that there was any prior violent incidents, threats or animosity between Mr.Huwe and Ms.Lawrence.It cannot be said that the evidence complained of was not used by the jury to influence their decision of finding guilt.The state elicited this testimony directly before the jury,when it had been ruled inadmissible.Then the state acted in misconduct when trying to persuade the trial court that it was their colleague(defense counsel)who elicited this line of answers.RP 84 The trial court ruled that defense did not open the door to prior bad acts.RP 85

> The error of the deliberate disregard by counsel of the court's ruling. prejudice must be presumed and appellate's motion for a new trial should have been granted.State v. Smith,189 Wash.422, 65 P.2d 1075(1937)

August 8,2007 Trial court also ruled that there will be no mention of the first trial of Mr.Huwe.RP 60 August 21,2007 State asks Cathlin when pictures

of her wound were taken.Cathlin states they were taken prior to the first trial.RP 37 The prosecutor directly elicited the prejudicial response from Cathlin.The state is the one that took the pictures the day of Cathlin's testimony at the first trial of Mr.Huwe.The blatant reference of the first trial combined with the prejudicial asked and answered questions of Cathlin borrowing the gun for protection because she was afraid of the defendant ,invited the jury to speculate as to what the first trial was,who knows what other charges they may have contemplated the first trial as being.The harm done to the defense was escruciating.There is a substantial likelihood that the misconduct affected the verdict.

> In State v. Smith,189 Wash.422 the prosecuting attorney,after the court ruled that the accused should not be questioned of his leaving the Marines and received accused's reply that he deserted,accused entitled to new trial notwithstanding question was not objected to and no motion to strike answer was made.In Thomas v. Hubbard,273 F.3d 1164, 177 (9th Cir.2001)the court held the prosecutor's questions of defendant about his use of firearm during criminal act,in violation of motion in limine order,constituted serious error because such evidence evokes visceral prejudicial reaction,in combination with other errors, required reversal of conviction.

The complained errors herein denied Mr.Huwe of his right to a fair trial by an impartial jury guaranteed by the 6th and 14th Amendments of the U.S. constitution and Article 1 Section 22 of Washington's Constitution.This court should reverse Mr.Huwe's convictions and remand for a new trial.

10. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE ELICITED FURTHER INADMISSIBLE TESTIMONY FROM A WITNESS.

August 8,2007 Incident 2 of 1/14/02,Ms.Donohue was at the home of her friend, Mr.Krouse,where the defendant called stating he was on the way to Mr.Krouse's home and that there would be problems.RP 9 Trial court ruled this incident was inadmissible.RP 79 August 21,2007 trial counsel in cross-examination of Cathlin "so you borrowed the gun from Mr.Krouse when?Cathlin responds "a month before this incident."Counsel asks what did you tell him why you wanted a gun?Cathlin responds"Dan had been calling and threatening Mr.Krouse.

RP 57-58 For trial counsel to go back into this same improper questioning of Ms.Donohue was deficient performance.There is no reasonable justification for trial counsel highlighting this incident when the questions were already improperly asked and answered.There was no tactical reason for this.Trial counsel was directly responsible for the later reply by Ms.Donohue,that Mr.Huwe had been calling and threatening Mr.Krouse.This admission was highly prejudicial to Mr.Huwe and should not been brought up in his trial.The prior bad acts being put before the jury may very well have been used in the jury's verdict.Trial counsel knew the only part of the whole scenario of Mr.Huwe and Mr.Krouse that was left to be put before the jury was the calling and threatening accusations, and counsel went and obtained it in cross of Cathlin.Counsel's deficient representation prejudiced the defendant, and there is a reasonable probability that except for counsel's unprofessional errors the result of the proceeding would have been different.

The defendant has demonstrated that trial counsel was ineffective.

> In Fahy v. Connecticut,the Supreme Court in considering the effect of erroneous admission of evidence they stated: "We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of,the question is whether there is a reasonable probability that the evidence complained of might have contributed to the conviction."375 U.S. at 86-87, 84 S.Ct. at 230 Similarly in Cooper v. Fitzharris where it is demonstrated that counsel was ineffective,we are not concerned with the amount of evidence presented to prove the guilt of the defendant,instead,we are required to determine whether counsel's errors and omissions have denied him a fair trial.at 586 F.2d 1333

Here in Mr.Huwe's case there is a high probablility that the testimony complained of that was elicited by trial counsel contributed to the conviction

> In State v. Allery,101 Wn.2d 591, 682 P.2d 312(1984)The admission of evidence of the defendant's prior misconduct as a mother was irrelevant to the issue and highly prejudicial.It's admission constituted prejudicial error.see State v. Descoteaux,94 Wash.2d 31,39, 614 P.2d 179(1980)quoted by Allery In Allery the Supreme Court held that in 2nd degree murder case admission of evidence of defendant's prior misconduct as a mother constituted prejudicial error and the court reversed her convictions and remanded for new trial.

August 24,2007 The prosecutor in closing argument said "The context here didn't start when the defendant was at Cathlin's residence.At least as far

as June 12th goes.RP 569 the state was pointing out the prior bad acts of Mr.Huwe.

> In State v. Kelley102 Wn.2d 188,the petitioner was on trial for the murder of her husband.She was not on trial for yelling at her neighbors or for beating on her own door with a shovel.The admission of the evidence of those irrelevant prior specific acts of conduct could only distort the true issues at trial.the admission of that evidence was prejudicial and hence constituted reversible error.
> There is definitely some similarities between the Kelley case and Mr.Huwe 's case.Mr.Huwe was not on trial for calling and threatening Mr.Krouse.

The admission of that was absolutely irrelevant and had already been ruled inadmissible.Mr.Huwe's right to a fair trial by an impartial jury was violated by the admission of these statements,by his ineffective counsel.Those rights guaranteed by the 6th and 14th Amendments of the U.S. constitution and Article 1 Section 22 of the Washington Constitution.Mr.Huwe's conviction should be reversed and a new trial ordered.

11. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT TO THE ADMISSION OF BOOKING ROOM PHOTOGRAPHS OF THE DEFENDANT HANDCUFFED AND SHACKLED TO A CHAIR.

August 22,2007 Pictures of Mr.Huwe the evening of June 12,2002 taken in the booking room.RP 279 no objection to their admission RP 280 Deputy Jenkins states Mr.Huwe is not looking at the camera.RP 281 The prosecutor says "would you mind holding it up, so all the jurors can see it.RP 281 Published to the jury RP 284

> Measures which single out a defendant as a particularly dangerous or or guilty person such as physical restraint or shackling threatened his constitutional right to a fair trial.State v. Finch,137 Wash.2d at 845, 975 P.2d 967

Trial counsel then says to Deputy Jenkins the picture he is apparently wearing handcuffs and is chained to the chair?"Yes he is "RP 292 Deputy says he wouldn't look at us in that photo.RP 293

Not only was it deficient for trial counsel to not object to the admission of these photos but to also specifically point the handcuffs and chains out to the jury was totally unreasonable performance.Pointing that out,in front of the jury cannot be held to be a legitimate strategy or trial tactic.

In State v. Sanford,128 Wn.App.280, 115 P.3d 368(Div.II 2005)it was

found there was no valid reason to expose to the jury prejudice of defendant's criminal propensity that booking photograph implied.

Just like there was no valid reason to expose pictures of mr.Huwe in a booking room,shackled and chained to a chair, to the jury.These photographs went with the jury in their deliberations.They implicitly suggested Mr.Huwe's guilt.The admission of them was improper.August 17,2007 The trial court had ruled that Mr.Huwe had earned the right to not be manacled or shackled in any manner whatsoever in his trial.RP 10

Generally a criminal defendant has a constitutional right to appear before a jury free of shackles.seeWilson v. McCarthy,770 F.2d 1482,1484 (9th cir.1985)

And was Deputy Jenkins implying guilt of Mr.Huwe because he was being non compliant with the authorities and not looking at the camera when they were taking these photographs.

Admission of mug shots(booking photo) is in conflict with the rules of evidence prohibiting the introduction of testimony regarding a defendant's bad character or past criminal record.ER 404(b).United States v. Sawyer,504 F.2d 878(5th cir 1974);United States ex rel. Bleimehl v. Cannon,525 F.2d 414 (7th cir 1975):United States v. Rixer, 548 F.2d 1224(5th Cir.1977).Also see United States V. Old Chief, 519 U.S. 172(1997);Coffin v. United States156 U.S. 432,453(1895)

Because the mug shot(booking photo) admitted into evidence by the prosecution was inadmissible, and any probative value was outweighed by the prejudicial effect,defense counsel's failure to make a proper objection should be presumed prejudicial.see Cronic,466 U.S. at 658-661;Strickland,466 U.S. at 692,694;Bonin,59 F.3d at 833;Rickman v. Bell,131 F.3d 1150,1156-1160(6th cir 1997);Bell v. Cone,535 U.S. at 695-696.And even if the court does not presume prejudice, it is clear here that prejudice resulted.Allowing the prosecutor to show the jury photographs of petitioner chained down was prejudicial because it more than just suggested that petitioner was a bad person,it showed the jury that someone thought it necessary to chain him down.see Old Chief Id.Sager v. Maass,907 F.Supp.1412(1995)grant of writ affirmed,84 F.3d 1212(9th Cir.);U.S. v. Bland,908 f.2d 471,473(9th cir.1990);Lyons v. McCotter,770 F.2d 529(5th cir 1985);United States v. Bosch,584 F.2d 1113(1st cir1978);Deck v. Mo,544 U.S. 622(2005).

The admittance of these photographs infringed upon Mr.Huwe's right to due process and right to a fair trial by an impartial jury that's guaranteed by the 5,6, and 14th Amendments of the U.S. constitution and Article 1 Section 22 of the Washington State Constitution.

The Washington State Supreme Court found that counsel's failure to object to petitioner being shackled during penalty phase required remand for new penalty phase.Davis,In re,152 Wash.2d 647, 101 P.3d 1(2004)

12. THE TRIAL COURT ERRED IN FAILING TO DISQUALIFY THE COLUMBIA COUNTY PROSECUTOR'S OFFICE OR TO APPOINT AN INDEPENDENT SPECIAL COUNSEL.

A superior court's decision not to disqualify a prosecutor is reviewed de novo.State v. Greco,57 Wn.App.196,200, 787 P.2d 940,review denied,114 Wn.2d 1027(1990). "[A] Public prosecutor is a quasi-judicial officer.He represents the State,and in the interest of justice must act impartially." State v. Huson73 Wn.2d 660,663, 440 P.2d 192(1968),cert.denied,393 U.S. 1096, 89 S.Ct.886, 21 L.Ed.2d 787(1969) If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially,then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well.See generally State v. Stenger,111 Wash.2d 516,520-23, 760 P.2d 357(1988). In Stenger,our Supreme Court held that the Prosecuting Attorney of Clark county and his entire staff were disqualified from prosecuting charges against a defendant who had once been represented by the prosecuting attorney in another criminal matter,prior to the assumption of that office.

In this case, one of the victims is a Public Defender who works closely with the prosecutor,Rea Culwell.Testimony showed the victim is in court with Columbia County prosecutors several times a week,they worked closely together, and that is clearly a reason why Ms.Culwell would take more than a professional interest in Mr.Huwe's conviction.It is likely, given that frequency, that Ms.Culwell worked more closely with Ms.Donohue than she did with many people in her own office.

This Court should follow the reasoning of the California Supreme Court in People v. Superior Court of Contra Costa County,10 Cal.3rd 255, 137 Cal. Rptr.476, 561 P.2d 1164(1977).The defendant in that case,Greer,was charged with murder.He moved for disqualification of the local prosecutor "allefing a conflict of interest arising largely from the employment in the district attorney's office of the victim's mother."at 1166-67.The trial court granted the motion for disqualification and the California Supreme Court affirmed. They noted that the mother of the victim,a "discovery clerk" employed by the District Attorney for over a year, was scheduled to be a material witness for the prosecution.In holding that the defendant had a right to a pretrial disqualification of the local prosecutor, the court held that prosecution by a biased prosecutor implicated the defendant's due process right to a fair and impartial trial:The California Supreme Court noted that the concept of a public prosecutor was developed in America because of the public perception that the English system of private prosecutions was unfair.American believed that an officer in a position of public trust could make decisions more impartially than could the victims of crimes or other private complaintants..."(Citations Omitted)...This advantage of public prosecution is lost if those exercising the discretionary duties of the district attorney are subject to conflicting personal interests which might tend to compromise their impartiality.In short, the prosecuting attorney "is the representative

of the public in whom is lodged a discretion which is not to be controlled by the courts,or by an interested individual..."quoting United States v. Cox,342 F.2d 167,192(5th Cir.1965) For these reasons, the California Supreme Court concluded that a trial judge had the authority to disqualify the prosecutor on the motion of the defendant, in cases where the judge "determine that the attorney suffers from a conflict of interest which might prejudice him against the accused and therefy affect, or appear to affect, his ability to impartially perform the discretionary functions of his office."The trial court was affirmed.561 P.2d at 1173

Here, Mr.Huwe seriously injured a person with whom the Columbia Prosecutor work very closely, several times a week, on numerous cases.See RP August 17,2007 RP 32-33 August 8,2007 RP 8 and August 24,2007 RP 556 Ms.Culwell in spite of nearly 40 years including the enhancements, pushed very hard in extensive pre-trial motions and throughout the trial to establish aggravating factors with which she could argue for an exceptional sentence. It is clearly in the personal interest of anyone working for the Columbia County Prosecution to see to it that anyone seriously injuring such a close colleague would not go unpunished.August 8,2007 RP 56-57,67-68 Ms.Culwell argued against admission of any evidence that reflected badly on Ms.Donohue. Two of the most important aggravating factors she argued(Good Samaritan and Pattern of Abuse)were not found by the jury.(CP 338,342)

In Marshall v. Jerrico,Inc.,100 S.Ct.1610, 446 U.S. 238(U.S. Dist.Coll1980) A scheme injecting a personal interest,financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions.see Bordenkircher v. Hayes434 U.S.357,365, 95 S,Ct.663,669, 54 L.Ed.2d 604(1978)In Young v. U.S.ex rel.Vuitton et Fils S.A.,107 S.Ct.2124 481 U.S.787(N.Y.1987) the Court stated federal prosecutors are prohibited from representing the Government in any matter in which they,their family or their business associates have any interest.The Court found that the appointment of an interested prosecutor is a fundamental error.An error is fundamental if it undermines confidence in the integrity of the criminal proceeding.Rose v. Clark,478 U.S.570,577-78, 106 S.Ct.3101,3105-06, 92 L.Ed.2d 460(1986);VanArsdall,supra,475 U.S.at 681-82, 106 S.Ct. at 1436-37:Vasquez v. Hillery,474 U.S.254,263-64, 106 S.Ct.617,623-24(1986)The appointment of an interested prosecutor raises such doubts.Prosecution by someone with conflicting loyalties "calls into question the objectivity of those charged with bringing a defendant to judgement."at 623

The allowing of the Trial Court's appointment of Ms.Culwell to continue as lead prosecutor was err of serious consequences.Mr.Huwe was denied due process of law and right to a fair trial guaranteed to him by the United

States Constitution under Amendments 5 and 14.Mr.Huwe's convictions should be reversed and remanded for a new trial.

If this Court cannot see the special interest held by the prosecutor then what of the her seeking more time then his last sentence.Did the prosecu tor seek a longer sentence because Mr.Huwe exercised his Constitutional right to Appeal and had successful petition?If so then the prosecutor violated Mr.Huwe's Constitutional right through the U.S. Due Process clause of the 14th Amendment.

In North Carolina v. Pearce,395 U.S.711,725, 89 S.Ct.2072,2080, 23 L.Ed.2d 656, that the Due Process Clause of the Fourteenth Amendment "requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Where presumption of vindictiveness applies to an increased sentence following reconviction after successful appeal from conviction, sentencing authority or prosecutor must rebut the presumption that the increased sentence or charge resulted from vindictiveness and where the presumption does not apply the defendant must affirmatively prove actual vindictiveness.Wasman v. United States,104 S.Ct.3217, 468 U.S. 559(Fla 1984)The Supreme Court held that after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.Wasman v. United States

Why was it the prosecutor sought such an increase in Mr.Huwe's sentence?

13.THE TRIAL COURT-JUDGE ERRED IN REFUSING TO RECUSE HIMSELF FROM MR.HUWE'S CASE, WHERE ONE OF THE VICTIMS,CATHLIN DONOHUE WAS THE PUBLIC DEFENDER IN COLUMBIA COUNTY WHOM JUDGE ACEY WAS THE LEGAL BINDING OVERSEER OF MS.DONOHUE'S CONTRACT WITH THE COUNTY OF COLUMBIA.

August 17,2007 Trial counsel,Scott Gallina,for defendant objects to the current configuration of Judge Acey presiding over the case as well as Columbia County Prosecuting staff.RP 31-36 Mr.Huwe would like to direct this here Court to the whole tone of the objection and Judge Acey's reaction. Counsel states on the record that it has came to our attention that one of the victims in this case,Miss Donohue is not just a practicing attorney in the county, but a public defender;is that correct? Judge's response "You bet." "She has one of my two contracts with the county.I approve her." RP 31 Mr.Huwe would like to point out to this honorable Court that Judge Acey did not himself lay this out on the record, defense pointed it out.Now who

is to know if he directly tried to conceal the fact of the matter but you would think that it would be his sworn duty of Judge to reveal this information.Mr.Huwe would also like to point out that the fact of Judge Acey being overseer of Ms.Donohue's work contract was not even presented by appellant counsel.The Court of Appeals should have been infromed of the whole relationship between Acey and Ms.Donohue.

Canon 3 of Judicial Conduct (D) disqualification (1)(c) Judges should disqualify themselves in a proceeding in which their impartiality might be reasonably questioned,including but not limited to instances in which: (c)the Judge knows that individually or as a fiduciary,the Judges or the Judges spouse or member of the Judges family residing in the judges household has an economic interest in the subject matter in controversy or in a party to the proceeding,or is an officer,director or trustee of a party.

Course Judge Acey has a personal interest in this case the victim Donohue had a contract with Columbia County and Acey approved and signed that contract Acey has an interest in protecting Ms.Donohue's reputation and showed so when he made his rulings on not allowing any of Ms.Donohue's sobriety in regards to the day of and before the shooting.Nor allowed her arrest record and in fact a crime of dishonesty against her that is clearly allowed by the Rules of Evidence.The end result of the trial was definitely going to reflect back upon Judge's Acey having approved Ms.Donohue as Public Defender. August 8,2007 Judge Acey not only ordered nothing of Ms.Donohue's alcohol and drug use be mentioned but also precluded defense from diminished capacity evidence.RP 65 Part of his reasoning he relied upon was the fact he had already ruled on that before the last trial.RP 65 Judge Acey's impartiality is definitely an issue.This second trial was oredered by the Court of Appeals no judge wants to get reversed and Judge Acey definitely made that plain by statements he made about having to have another trial for Mr.Huwe.This second trial was just for show to satisfy the Court of Appeals.It was literally a mockery of justice.

In State v. Graham,91 Wn.app.663, 960 P.2d 457(Div.2 1998) the judge there was required to recuse himself from bench trial on malicious mischief charge when he realized that crime had been committed against property of one of clients.Specifically, he did legal work for the city of South Bend, the vandalized property of the city of South Bend for which the defendant was on trial for.

Here in Mr.Huwe's case we have some what of the same relationship

The circumstances of this could definitely result in a reasonably disinterested prudent person concluding that the proceedings were unfair.Not only did Acey approve Ms.Donohue's contract but she also appeared and argued before him on a regular basis as well as seen each other at a Bar Association meeting August 17,2007 Judge Acey says Ms.Donohue is not a County employee, period! RP 33 Judge Acey can paint the picture any way he likes but thats exactly what Ms.Donohue was.Just because it was an independent contract relationship she's still sub contracted,she is getting paid by the county.This is not a county where the Public Defender's Office is out of the judges hands no this here is where basically Ms.Donohue was answering to Judge Acey.

The Court held there are strict due process requirements as to the neutrality of officials performing judicial or quasi-judicial functions.cf.Tumey v. Ohio,273 U.S.510, 47 S.Ct.437, 71 L.Ed.749,Ward v. Monroeville,409 U.S. 57, 93 S.Ct.80, 34 L.Ed.2d 267 The Court held in Liljeberg v. Health Services Acquisition corp,108 S.Ct.2194, 486 U.S. 847(1988) that district judge violated statute requiring judge to disqualify himself in litigation involving university and trial judge's failure to disqualify himself in proceeding in violation of statute required vacatur.
The United States Supreme Court has said that "Every procedure which would offer a possible temptation to the average man as a judge not to hold the balance nice,clear and true between the State and the accused denies the latter due process of law."Tumey v. Ohio,at 532
Disqualification is required if an objective observer would entertain reasonable questions about the judge's impartiality.If a judge's attitude or state of mind leads a detached observer to conclude that a fair and impartial hearing is unlikely, the judge must be disqualified.Indeed, in such circumstances, I should think that any judge who understands the judicial office and oath would be the first to insist that another judge hear the case.Liteky v. United States,510 U.S. 540,555, 114 S.Ct. 1147(1994)
Defendant tried by a partial judge is entitled to have his conviction set aside, no matter how strong the evidence against him.Edwards v. Balisok, 117 S.Ct.1584, 520 U.S.641(1997)

Trial Court-Judge Acey denied Mr.Huwe his Constitutional rights guaranteed him throug Article 1 Section 3 and 22 of the Washington State Constitution and Amendments 5,6, and 14 of the United States Constitution.In order for Mr.Huwe to receive a fair trial this court should remand for a judge other than Judge Acey sitting on the bench.

14.THERE WAS INSUFFICIENT EVIDENCE OF INTENT TO KILL OR ASSAULT IN THIS CASE TO SATISFY PROOF BEYOND A REASONABLE DOUBT STANDARD THEREFORE DENYING MR.HUWE OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL.

The United States Supreme Court set the reasonable doubt standard of proof for criminal cases in In Re Winship,397 U.S.358, 90 S.Ct. 1086, 25 L.Ed.2d 368(1970).Under this standard of proof,the prosecutor must prove each and every element of the statute beyond a reasonable doubt.A claim of insufficient evidence is one of constitutional magnitude.Jackson v. Virginia,443 U.S.307,316, 99 S.Ct.2781,2787, 61 L.Ed.2d 560(1979);In Re Winship,State v. Baeza,100 Wn.2d 487,488, 670 P.2d 646(1983).If there is insufficient evidence of an element of the crime charged it is violation of the defendant's Fifth and Fourteenth Amendment due process rights.Winship at 361,(U.S.Const.amends. V & XIV).Such a constitutional claim may be raised for the first time on appeal.RAP 2.5(a)(3);State v. Regan,97 Wn.2d 47,50, 640 P.2d 725(1982);State v. Theroff,95 Wn.2d 385,391, 622 P.2d 1240(1980), Baeza at 488.

"To satisfy due process requirements that State must prove, beyond a reasonable doubt, every fact necessary to constitute the crime charged." Jackson v. Virginia,supra

In evaluating petitioner's claim, the reviewing court must not attempt to determine whether it believes the State has met the burden of proof.State Green,supraat 221, 616 P.2d 628. Rather, the relevant inquiry is "whether, after viewing, the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of [...] beyond a reasonable doubt."Jackson v. Virginia,supraat 319, 99 S.Ct. at 2789;State v. Green,94 Wn.2d 216,616 P.2d 628(1980).Baeza,100 Wn.2d at 490.

The statute Murder in second degree requires the **intent to cause the death of another person.**RCW§ 9A.32.050(1)(a)(emphasis added).That is the crime of which Daniel Huwe was charged.(CP 12) The law requires that the State prove beyond a reasonable doubt each and every element of the crime. In this instance, the State failed to prove the element of intent to kill.In this case there is no evidence Daniel at any time formed the intent to kill or assault.The State argued that he pointed the gun at Ms.Lawrence and at Ms.Donohue and fired it, but did not point out he had already fired the

gun once only to find out it had blank rounds.see August 21,2007 RP 41 Even in the State's final argument they describe the shots at Ms.Lawrence being fired in rapid succession "... if you really think about it, you know it sounds like those were rapid, pow,pow..." see August 24,2007 RP 569 If Mr.Huwe thinks there are blanks in the gun and fires off shots in rapid succession, albeit with the gun aimed at Ms.Lawrence and Ms.Donohue, to make a lot of noise and scare them, he did not have the time to notice he was shooting live rounds, that is not evidence of intent to either kill or cause serious injury. August 21,2007 Ms. Donohue even testified that when Daniel saw Ms.Lawrence's condition he gasped loudly enough for her to hear it in the kitchen.Even though he had been reluctant to call 911 before seeing Lenore, he called immediately after seeing her condition.RP 40 That would not be the reaction of someone who intended to kill.

The Court of Appeals relied upon State v. Hoffman,116 Wn.2d 51,84-85, 804 P.2d 577(1991) proof that a defendant fired a weapon at a victim is of course sufficient to justify a finding of intent to kill.

Mr.Huwe respectfully asks this Court to consider the facts of this case the Hoffman case should not be controlling precedent in Mr.Huwe's case.There was no shred of evidence indicating that Hoffman believed he was firing a weapon loaded with blanks to the contrary he knew there were live rounds That is not the case here, the facts are different.

The law in Washington regarding voluntary intoxication is that: No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.RCW § 9A.16.090. Interpreting this statute, this here Washington State Supreme Court has said it "describes the manner in which a particular type of evidence is to be employed, in much the same way as neutral instructions describe the use of inferences or circumstantial evidence."State v. Coates,107 Wn.2d

882,890, 735 P.2d 64(1987).
The degree of intoxication, however need not be so extreme as to amount to temporary insanity.State v. Mriglot88 Wn.2d 573,576, 564 P.2d 784(1977) (discussing the distinction between involuntary intoxication as an excuse to a general intent crime and voluntary intoxication that negates specific intent).

August 21,2007 The former teacher,Mr.Spray, said he could smell alcohol on Mr.Huwe's breath from quite a distance away.He also said Daniel was acting "a little goofy" or intoxicated.RP 107-109 In answer to the question by Mr.Spray, did he have a couple of beers after work, Daniel said "More like a couple of fifths." Id. August 21,2007 Ms.Donohue stated she had seen Mr.Huwe intoxicated at least 25 times and on this occasion he was more intoxicated than normal.RP 70-71 Thus, there was clear evidence from the testimony who had had over a year long relationship with Mr.Huwe that he was very intoxicated. The officers who testified that Mr.Huwe did not stagger thats because Mr.Huwe was chained to the booking chair for 6 hours which allowed him to sober up.

The state did not prove the element of intent beyond a reasonable doubt therefore denying Mr.Huwe his Constitutional rights to due process of law and right to fair trial that are guaranteed him by and through Article 1 Section 3 and 22 of the Washington State Constitution and Amendments 5,6, and 14 of the United States Constitution.This Court should reverse Mr.Huwe's convictions and remand for a new trial.

15.THE CUMULATIVE EFFECT OF ALL ERRORS REQUIRES REVERSAL OF MR.HUWE'S CONVICTION.

Mr.Huwe has raised several errors herein.The cumulative error doctrine applies only when several trial errors occurred which, standing alone may not be sufficient to justify a reversal, but when combined together may deny a defendant a fair trial.State v. Grieff,141 Wn.2d 910,929, 10 P.3d 390(2000);State v. Coe,101 Wn.2d 772,789, 684 P.2d 668(1984);State v. Whalon, 1 Wash.App.785,804, 464 P.2d 730(1970) three errors amounted to cumulative error and required reversal.

In State v. Suarez-Bravo,72 Wn.App.359, 864 P.2d 426(Div III 1994)the Court held that the cumulative effect of prosecutor's questions as well as prejudicial nature of prosecutorial misconduct denied defendant a fair trial. In State v. Torres,76 Wn.App.16, 544 P.2d 1069(Div I 1976) the court held that cumulative effect of instances of prosecutorial misconduct in opening statements, interrogation of witnesses and closing argument prejudiced defendant and effectively denied him of his Constitutional right to a fair trial. In State v. Case,49 Wash.2d 66,73, 298 P.2d 500,504(1956) the Court stated there comes a time when the cumulative effect of repetitive prejudicial error becomes so flagrant that no instructions or series of instructions can erase it and cure the error.

In State v. Robinson,the Court found jurors and Courts are made up of human beings whose condition of mind cannot be ascertained by other human beings.

Mr.Huwe shows that there was an accumulation of prejudicial errors.Petitioner is entitled to a new trial under the cumulative error doctrine.

F.Conclusion

This Honorable Court should accept review, this Petition should be carefully read and not discarded just because the lower Court of Appeals already made their decision on the case which Mr.Huwe believes they overlooked the facts of the case and mis-applied the law.

Respectfully Submitted,

this day 22 of October,2009.

Daniel R. Huwe, 10-22-09
Daniel R. Huwe Date
Petitioner-Pro-Se

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 26462-9-III**
	)	
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
DANIEL ROSS HUWE,	)	**UNPUBLISHED OPINION**
	)	
Appellant.	)	

BROWN, J. — Daniel Ross Huwe appeals his convictions for second degree murder and first degree assault–domestic violence, contending (1) the trial court erred in failing to disqualify the prosecutor; (2) the trial court judge erred by failing to recuse himself from the case; and (3) the evidence was insufficient for the jury to find the intent elements of both crimes. We reject these contentions and Mr. Huwe's additional grounds for review. Accordingly, we affirm.

FACTS

Because of the evidence sufficiency challenge we state the facts in the light most favorable to the State. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

On June 12, 2002, Captain Mark Franklin of the Columbia County Sheriff's Office responded to a 911 call at Ms. Donohue's residence in Dayton. He found Lenor L.

Lawrence and Cathlin Donohue lying on the floor suffering from gunshot wounds. Ms. Donohue named Mr. Huwe, whom she previously dated, as her assailant. The pair were taken to the hospital, where Ms. Lawrence died from her wounds. Mr. Huwe was arrested near the shooting scene that same day with the gun on his person.

The State charged Mr. Huwe with first degree premeditated murder and first degree assault. In a prior trial, he was found guilty of second degree murder and first degree assault. We granted Mr. Huwe's personal restraint petition, vacated his convictions, and ordered a new trial. *See In re Pers. Restraint of Huwe*, 136 Wn. App. 1005 (2006) (unpublished). On remand, Mr. Huwe was charged with one count of second degree murder against Ms. Lawrence, and one count of first degree assault–domestic violence against Ms. Donohue. Both charges included a firearm enhancement allegation and aggravating circumstance allegations.

Before trial, the court granted the State's motion to exclude certain character evidence about Ms. Donohue. Mr. Huwe unsuccessfully moved to appoint a new prosecutor who did not have a professional relationship with Ms. Donohue. Before the second trial, Ms. Donohue, an attorney, contracted with Columbia County to provide public defense services and often appeared in court against Rea Culwell, the prosecutor here. The court ruled the professional relationship between Ms. Donohue and the Columbia County Prosecutor's Office was not grounds for Ms. Culwell's disqualification without "show[ing] some actual harm or prejudice to [Mr. Huwe] by virtue of that relationship." E Report of Proceedings (RP) (Aug. 17, 2007) at 35.

Mr. Huwe asked the trial judge to recuse himself in view of his professional contacts with Ms. Donohue. The judge noted she was a contract defense attorney and earlier was a pro bono defense attorney. The judge observed outside the courtroom:

> I have only seen [Ms.] Donohue at some function other than this courtroom once, and that was at the annual Bar Association meeting . . . I saw her there once last year. . . . I said hello and that was about it.

E RP (Aug. 17, 2007) at 35. The judge denied Mr. Huwe's request for a new judge, ruling his disqualification was unnecessary "absent a showing of some sort of actual prejudice or harm to [Mr. Huwe]." E RP (Aug. 17, 2007) at 37.

Ms. Donohue testified that on the event day, Mr. Huwe called her for a ride. She picked him up near a baseball field where he was talking with his former teacher, David Spray. While driving, Mr. Huwe assaulted her and insisted she take him to her house. There, Mr. Huwe continued to assault her before taking a gun from Ms. Donohue's bedroom and placing it under a couch cushion. Eventually, Mr. Huwe fired a blank round at her foot: "the first round was always a blank, just for safety purposes." 1 RP (Aug. 21, 2007) at 40.

According to Ms. Donohue, when Ms. Lawrence came to the house and confronted Mr. Huwe, he pulled out the gun and pointed it at Ms. Lawrence. When Ms. Lawrence started running toward the bathroom, Mr. Huwe shot her in the leg and then in the back. When Ms. Donohue tried to call 911, Mr. Huwe shot her in her thigh. After Ms. Donohue begged Mr. Huwe to call 911, he called twice and hung up, but when "[h]e looked and saw [Ms. Lawrence] . . . he gasped, and then he came back and he put in

the phone call to 911." 1 RP (Aug. 21, 2007) at 40. Mr. Huwe reported two persons down, hung up the phone without identifying himself, took the gun, and left the house.

Dr. John Shannon testified regarding his hospital examination of Ms. Donohue. He testified she had a gunshot wound that went through her left thigh. Dr. Daniel Selove testified about his autopsy of Ms. Lawrence. He opined that she had two gunshot wounds causing her death, one that entered through her back, and one that entered near her right hip.

Relevant to Mr. Huwe's intoxication claims, Ms. Donohue related when she picked up Mr. Huwe, he was "[v]ery intoxicated." 1 RP (Aug. 21, 2007) at 70. Mr. Spray testified he spoke to Mr. Huwe for 15 to 20 minutes before Ms. Donohue arrived:

> [W]hen [Mr. Huwe] came up to me . . . there was smell [sic] of alcohol on him, and I'd asked him if he had a couple of beers after work? And he said, "More like a couple of fifths." And I could smell it on him.

2 RP (Aug. 21, 2007) at 107-08. According to Mr. Spray, Mr. Huwe acted intoxicated, and "a little goofy." 2 RP (Aug. 21, 2007) at 109. On the other hand, Gerald Pulliam testified he saw Mr. Huwe walking normally just before his arrest. Columbia County Sheriff Walter Hessler related Mr. Huwe responded to his commands. Columbia County Deputy Sheriff Jeff Jenkins testified he did not remember seeing Mr. Huwe trip, stumble, or stagger or have difficulty communicating. The court ultimately gave the standard intoxication instruction for the jury to consider on the issue of intent.

The jury found Mr. Huwe guilty as charged, found the existence of the firearm enhancements on both counts, and found one aggravating circumstance on the count of first degree assault – domestic violence. The trial court consecutively sentenced Mr.

Huwe within the standard range to 280 months for the second degree murder, and 183 months for the first degree assault–domestic violence. Mr. Huwe appealed.

ANALYSIS

A. Prosecutor Disqualification

The issue is whether the trial court erred in refusing to disqualify the Columbia County Prosecutor, Ms. Culwell. Mr. Huwe contends Ms. Culwell's professional relationship with Ms. Donohue gave her a personal interest in this case.

When reviewing a decision not to disqualify a prosecutor, we apply an abuse of discretion standard. *State v. Orozco*, 144 Wn. App. 17, 19, 186 P.3d 1078, *review denied*, 165 Wn.2d 1005 (2008) (citing *State v. Schmitt*, 124 Wn. App. 662, 666, 102 P.3d 856 (2004)). "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists." *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

A prosecutor is a quasi-judicial officer required to act impartially. *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968). "If a prosecutor's interest in a criminal defendant or in the subject matter of the defendant's case materially limits his or her ability to prosecute a matter impartially, then the prosecutor is disqualified from litigating the matter, and the prosecutor's staff may be disqualified as well." *State v. Ladenburg*, 67 Wn. App. 749, 751, 840 P.2d 228 (1992), *abrogated on other grounds by State v. Finch*, 137 Wn.2d 792, 808-10, 975 P.2d 967 (1999). Prosecutors are not subject to the appearance of fairness doctrine. *See Finch*, 137 Wn.2d at 810. Thus, a defendant must show an actual lack of impartiality to disqualify a prosecutor.

Mr. Huwe cites *State v. Stenger*, 111 Wn.2d 516, 760 P.2d 357 (1988). In *Stenger*, a death penalty case, the court found the prosecutor should be disqualified from handling the case, where he previously represented the defendant in an unrelated criminal case. *Id.* at 518, 521-22. The disqualification was not based upon the fact of the prior representation alone. *Id.* at 521. Notably, the court reasoned "privileged information" in the prosecutor's hands "could well work to the accused's disadvantage." *Id.* at 522. Here, unlike *Stenger*, nothing shows Ms. Culwell ever represented Mr. Huwe or had access to privileged information.

Next, Mr. Huwe urges us to adopt the reasoning of *People v. Superior Court of Contra Costa County*, 19 Cal.3d 255, 561 P.2d 1164 (1977), *superseded by statute as stated in People v. Conner*, 34 Cal.3d 141, 147, 666 P.2d 5 (1983). There, the court upheld the trial court's disqualification of the prosecutor in a homicide case, where the victim's mother was an employee of the prosecutor's office who worked in the very office in which the prosecution was being prepared. *Id.* at 269-70. Here, unlike *Superior Court of Contra Costa County*, Ms. Donohue did not work in the same office as Ms. Culwell, nor is there any indication in the record that she exerted any influence in the case. Accordingly, *Superior Court of Contra Costa County* is distinguishable.

Finally, Mr. Huwe cites to *State v. Cox*, 246 La. 748, 167 So.2d 352 (1964). There, the defendant was charged with defaming a judge and the prosecutor. *Id.* at 757-58. The prosecutor recused himself from the case, but continued to represent the State in the case alleging defamation of the judge. *Id.* at 758-59. The court found the trial court judge had the mandatory duty to order the prosecutor to recuse himself,

"when it was disclosed to him that [the prosecutor] was, in effect, an injured party in both cases and had a personal interest in securing the conviction." *Id.* at 764. Here, unlike *Cox*, Ms. Culwell is not a victim of nor did she have any involvement in the charged crimes other than as the prosecuting attorney. Thus, *Cox* is distinguishable.

Given merely professional relationships, Mr. Huwe fails to show an actual lack of prosecutor impartiality. Moving to exclude character evidence and alleging aggravating factors are routine prosecutorial activities. In sum, we cannot say the trial court abused its discretion in refusing to disqualify Ms. Culwell.

B. Judge Recusal

The issue is whether, considering the appearance of fairness doctrine, the trial court judge erred in not recusing himself. Mr. Huwe argues the judge had a personal conflict of interest because Ms. Donohue regularly appeared before him.

We review recusal decisions for an abuse of discretion. *State v. Leon*, 133 Wn. App. 810, 812, 138 P.3d 159 (2006). Due process, the appearance of fairness doctrine, and the Code of Judicial Conduct require a judge's disqualification if the judge is biased against a party or if impartiality reasonably may be questioned. *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942 (1955); *State v. Post*, 118 Wn.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992); CJC 3(D)(1). The test is objective: whether a reasonable person with knowledge of the relevant facts would question the judge's impartiality. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). "Prejudice is not presumed." *State v. Dominguez*, 81 Wn. App. 325, 328, 329, 914 P.2d 141 (1996).

"Evidence of a judge's actual or potential bias is required before the appearance of fairness doctrine will be applied." *Id.* at 329 (citing *Post*, 118 Wn.2d at 618-19, & n.9).

Mr. Huwe does not show evidence of the trial judge's actual bias to raise the appearance of fairness doctrine, and no potential bias evidence. Ms. Donohue appeared before the judge on multiple occasions in her capacity as an attorney and the judge greeted her once outside the courtroom at a bar association meeting. Recusal was not required. *See, e.g., Leon*, 133 Wn. App. at 812-13 (recusal not required where prosecution witness had regularly appeared before the presiding judge).

C. Evidence Sufficiency – Intent

The issue is whether, considering the intent requirements and Mr. Huwe's intoxication claims, the evidence presented at trial was sufficient to support Mr. Huwe's convictions.

The evidence sufficiency test is whether, after viewing the evidence and all reasonable inferences most favorably to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (citing *Jackson v. Virginia,* 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Salinas*, 119 Wn.2d at 201. Further, "this court will defer to the trier of fact to resolve conflicts in testimony, weigh evidence, and draw reasonable inferences therefrom." *State v. Bryant*, 89 Wn. App. 857, 869, 950 P.2d 1004 (1998) (citing *State v. Hayes*, 81 Wn. App. 425, 430, 914 P.2d

788 (1996)). Both direct and circumstantial evidence may sustain a guilty verdict. *State v. Brooks*, 45 Wn. App. 824, 826, 727 P.2d 988 (1986).

"A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime." RCW 9A.08.010(1)(a). "Specific intent cannot be presumed, but it can be inferred as a logical probability from all the facts and circumstances." *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994). And "a trier of fact may infer that a defendant intends the natural and probable consequences of his or her acts." *State v. Caliguri*, 99 Wn.2d 501, 506, 664 P.2d 466 (1983).

1. Second Degree Murder. Mr. Huwe first contends insufficient evidence shows he acted with the intent to cause Ms. Lawrence's death. A conviction for second degree murder requires the jury to find that a defendant "[w]ith intent to cause the death of another person but without premeditation . . . causes the death of such person." RCW 9A.32.050(1)(a). Further, "[p]roof that a defendant fired a weapon at a victim is, of course, sufficient to justify a finding of intent to kill." *State v. Hoffman*, 116 Wn.2d 51, 84-85, 804 P.2d 577 (1991).

Here, Ms. Donohue testified Mr. Huwe pointed the gun at Ms. Lawrence, and shot her in the leg and back. Viewed in the light most favorable to the State, this evidence is sufficient for the jury to infer Mr. Huwe's intent to cause the death of Ms. Lawrence. *See Hoffman*, 116 Wn.2d at 84-85. While Mr. Huwe argues the jury could have found he thought the gun was loaded with blanks and he merely intended to scare

Ms. Lawrence, the jury was in the best position to resolve competing inferences from the evidence. *See Bryant*, 89 Wn. App. at 869 (citing *Hayes*, 81 Wn. App. at 425). Similarly, that Mr. Huwe gasped when he saw Ms. Lawrence and called 911 provided facts for the jury to draw inferences.

2. First Degree Assault – Domestic Violence. A conviction for first degree assault, as alleged here, requires the jury to find that a defendant, "with the intent to inflict great bodily harm . . . [a]ssaults another with a firearm." RCW 9A.36.011(1)(a). Thus, the requisite intent for the crime is "intent to inflict great bodily harm." *See, e.g., Wilson*, 125 Wn.2d at 218 (stating the mens rea for first degree assault is "intent to inflict great bodily harm"). "Great bodily harm" is defined as "bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ." RCW 9A.04.110(4)(c).

Pointing a gun at a person and then firing is sufficient to establish intent to inflict great bodily harm. *See Hoffman*, 116 Wn.2d at 84-85 (jury was entitled to find intent to kill from the fact that the defendant shot at the victims). If a jury could infer intent to kill from the firing of a weapon at victims, they could certainly find intent to inflict great bodily harm. Here, Ms. Donohue testified that as she tried to get to the phone to call 911, Mr. Huwe shot her in her thigh. Viewed in the light most favorable to the State, this evidence is sufficient for the jury to infer Mr. Huwe's intent to inflict great bodily injury and sustain Mr. Huwe's conviction for first degree assault-domestic violence.

3. Voluntary Intoxication. Finally, Mr. Huwe argues the jury should have found he was voluntarily intoxicated at the time of the crimes, and therefore, unable to form the requisite intent. The voluntary intoxication statute provides:

> No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his condition, but whenever the actual existence of any particular mental state is a necessary element to constitute a particular species or degree of crime, the fact of his intoxication may be taken into consideration in determining such mental state.

RCW 9A.16.090.

Voluntary intoxication is not an affirmative defense. *State v. Coates*, 107 Wn.2d 882, 889, 735 P.2d 64 (1987). Rather, "[t]he voluntary intoxication statute allows the trier of fact to consider the defendant's intoxication in assessing his mental state; the statute does not require that consideration to lead to any particular result." *Id.* at 889-90. Accordingly, the question of the effect of a defendant's intoxication upon the formation of the required mental state is a jury question. *See, e.g., State v. Mitchell*, 65 Wn.2d 373, 374, 397 P.2d 417 (1964) (jury decides if voluntary intoxication negates the defendant's ability to form the intent to kill).

Here, in accordance with the voluntary intoxication statute, the jury was instructed "evidence of intoxication may be considered in determining whether the defendant acted with a specific intent." CP at 323. Although Mr. Huwe points to facts in our record suggesting his intoxication state, the jury heard sufficient contrary facts suggesting his ability to form the requisite intent. Mr. Pulliam testified Mr. Huwe was walking normally; Sheriff Hessler testified Mr. Huwe followed his instructions; and

Deputy Jenkins testified he did not observe Mr. Huwe trip, stumble, or stagger and communicated with him without a problem or slurred speech. In sum, resolving the competing inferences was for the jury and did not require a particular result. *See Coates*, 107 Wn.2d at 889-90.

D. Additional Grounds for Review

1. Change of Venue. Mr. Huwe contends by seating jurors from Walla Walla County, the trial court denied him his constitutional right to be tried by a jury of the county where the alleged offenses were committed. Under the Washington Constitution, "[i]n criminal prosecutions, the accused shall have the right . . . to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed." CONST. ART. 1, § 22.

The record shows the trial court judge, on his own, moved venue from Columbia County, where the charged offenses occurred, to Walla Walla County. The trial was held in Columbia County, but the jurors were bused from Walla Walla County. When given the opportunity, Mr. Huwe did not object to the trial being conducted in this manner. By not objecting, Mr. Huwe waived any venue issue. *See State v. McCorkell*, 63 Wn. App. 798, 801, 822 P.2d 795 (1992) (in the context of proof of venue, holding "a criminal defendant waives any challenge to venue by failing to present it by the time jeopardy attaches").

To raise a constitutional error for the first time on appeal, "[t]he defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights." *State v. McFarland*, 127 Wn.2d 322, 333, 899

P.2d 1251 (1995); *see also* RAP 2.5(a)(3). "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case." *State v. Lynn*, 67 Wn. App. 339, 345, 835 P.2d 251 (1992). Here, Mr. Huwe does not show how being tried by jurors from Walla Walla County had such an effect.

2. Transport to Trial. Mr. Huwe contends the trial court erred in not ordering him to be held in the Columbia County Jail during the trial. He argues this error led to a juror seeing him as he was being transported to the trial, violating his constitutional rights to a presumption of innocence, an impartial jury, and due process. The trial court had no objection to Mr. Huwe's request to be held in the Columbia County jail, but deferred to the Columbia County Sheriff's decision. Mr. Huwe was held in Walla Walla, and transported to Columbia County each day for trial. The jurors were bused from Walla Walla to Columbia County each day. One juror, who lived in Dixie, was allowed to catch the bus in Dixie rather than in Walla Walla.

On the second trial day, outside the jury's presence, defense counsel stated:

> I talked with Mr. Huwe this morning and was advised . . . on the way through Dixie . . . coming here in the morning, he was seen by one of the jurors. He was standing on the side of the road. Is [sic] not sure to what extent the juror saw him. The person with whom he saw him gestured as if he recognized Mr. Huwe going by; had a discussion after that.
>
> And we don't have any more information than that, but I wanted to express my concern to the court.

3 RP (Aug. 22, 2007) at 144. The trial court asked defense counsel if the juror made any negative gestures toward Mr. Huwe; defense counsel responded, "[o]ther than

looking . . . at him, I don't think he made any gestures towards him." 3 RP (Aug. 22, 2007) at 145. The trial court learned Mr. Huwe was transported in "[a] van with a light on the top. The windows are kind of barred." 3 RP (Aug. 22, 2007) at 145. The trial court ordered the Department of Corrections (DOC) to transport Mr. Huwe to court via a different route, to avoid the juror seeing Mr. Huwe again. Defense counsel made no further requests of the court.

The federal and state constitutions entitle a criminal defendant to a fair trial by an impartial jury. U.S. CONST. amends. VI, XIV § 1; CONST. ART. 1, § 3, 21, 22. "The right to a fair trial includes the right to the presumption of innocence." *State v. Gonzalez*, 129 Wn. App. 895, 900, 120 P.3d 645 (2005). "[T]he appearance of shackles or other restraints may reverse the presumption of innocence by causing jury prejudice, and thus denying due process." *Id.* at 901 (internal quotation marks omitted) (quoting *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998)). "We review alleged violations of the right to an impartial jury and the presumption of innocence de novo." *Id.* at 900.

"It is not reversible error simply because jurors see a defendant wearing shackles." *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). In *Gosser*, the defendant moved for a mistrial on the basis that his shackles were removed in the corridor outside the courtroom, "presumably in the presence of at least some of the jurors." *Id.* His request for a mistrial was denied. *Id.* On appeal, the court affirmed the denial, reasoning "beyond [the] defendant's bare allegation, there is no indication in the record that the incident prejudiced the minds of the jurors against [the] defendant." *Id.*

at 435-36. Additionally, the court noted, "the trial court did not nor did [the] defendant request it to admonish or instruct the jury to disregard the incident." *Id.* at 436.

Here, nothing in the record suggests the incident prejudiced the juror against Mr. Huwe. *See Gosser*, 33 Wn. App. at 435-36. Further, even assuming the juror saw Mr. Huwe in the DOC vehicle, defense counsel did not request the trial court to instruct the jury regarding the incident. Accordingly, any error was waived. *See State v. Bonner*, 21 Wn. App. 783, 792-93, 587 P.2d 580 (1978) (shackling issue waived where no admonishment or jury instruction requested).

Mr. Huwe argues the trial court ordered the DOC transport officers to be in plain clothes, but never enforced this ruling. In the *Hartzog*[1] hearing held prior to trial, the trial court ordered the transport officers to "wear plain clothes instead of a whole uniform." E RP (Aug. 17, 2007) at 20-21. However, during the incident involving the juror from Dixie, the trial court stated:

> And I have got two uniformed officers in court with white "DOC" written right across their chest. The cat is out of [the] bag, as far as where Mr. Huwe might be spending his evening, I think, during this trial.

3 RP (Aug. 22, 2007) at 145.

Defense counsel did not take issue with this statement, nor does the record show any objection to the transport officer's dress. Accordingly, any error was waived. *Bonner*, 21 Wn. App. at 792-93. Further, the record does not show prejudice, as the extent to which the jury saw the uniformed officers is unclear. *See Gosser*, 33 Wn. App. at 435-36.

3. Jury Instructions. Mr. Huwe contends the trial court erred in giving jury instructions on two of the aggravating circumstances alleged by the State. But because the sentencing court elected not to impose an exceptional sentence, we need not address this contention further. The same reasoning applies to Mr. Huwe's contention that the trial court erred in asking the jury to determine whether the first degree assault offense involved an invasion of Ms. Donohue's privacy. While the jury answered the zone of privacy question in the affirmative, Mr. Huwe was sentenced within the standard ranges for his crimes and cannot appeal his standard range sentence.

4. Prosecutorial Misconduct. Mr. Huwe contends prosecutorial misconduct occurred in several instances. "To prevail on a claim of prosecutorial misconduct, the defendant must show both improper conduct by the prosecutor and prejudicial effect." *State v. O'Donnell*, 142 Wn. App. 314, 327, 174 P.3d 1205 (2007) (quoting *State v. Munguia*, 107 Wn. App. 328, 336, 26 P.3d 1017 (2001)). "[T]he defendant bears the burden of proof on both issues." *Id.* at 328 (citing *Munguia*, 107 Wn. App. at 336). Further, "'[a]bsent a proper objection, a defendant cannot raise the issue of prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *Id.* (quoting *Munguia*, 107 Wn. App. at 336).

Mr. Huwe first argues prosecutorial misconduct occurred when the prosecutor, in her closing argument, suggested the jury ignore the lesser-included offense instructions. With respect to the second degree murder charge, the jury was instructed on the crimes

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[1] *State v. Hartzog*, 96 Wn.2d 383, 635 P.2d 694 (1981).

of first and second degree manslaughter. With respect to the first degree assault charge, the jury was instructed on the crimes of second and third degree assault. In her closing argument, the prosecutor stated:

> The judge rightfully has told you of a series of crimes that are under murder in the second degree, and under assault in the first degree.
> But . . . I am going to ask you - - I am going to suggest to you that it would make more sense for you to just let the defendant go than to compromise. It would make more sense to either find him guilty of murder in the second degree, and assault in the first degree, or none of it. Because if there was one whit of evidence, one suggestion from anybody that the defendant was acting recklessly, or acting negligently, you know, then you might have a case for manslaughter.

8 RP (Aug. 24, 2007) at 573.

The prosecutor continued, arguing the facts did not support the lesser crimes. Mr. Huwe did not object.

It is not misconduct to argue inferences from the trial evidence as shown in this record. "The prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and to express such inferences to the jury." *State v. Stenson*, 132 Wn.2d 668, 727, 940 P.2d 1239 (1997). Even if the prosecutor engaged in misconduct, Mr. Huwe has not met the showing required for prosecutorial misconduct raised for the first time on appeal, that "'the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336).

Second, Mr. Huwe argues prosecutorial misconduct occurred when the prosecutor elicited testimony regarding his veracity and Ms. Donohue's veracity. "Generally, no witness may offer testimony in the form of an opinion regarding the

veracity of the defendant." *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007). Further, "[a] witness may not give an opinion as to another witness's credibility." *State v. O'Neal*, 126 Wn. App. 395, 409, 109 P.3d 429 (2005), *aff'd*, 159 Wn.2d 500, 150 P.3d 1121 (2007).

Mr. Huwe points to the State's questioning of Mr. Spray:

> [The State:] Did [Mr. Huwe] say anything else?
> . . . .
> [Mr. Spray:] . . . He made a reference to, "I'm going to end this tonight."
> [The State:] Was [Mr. Huwe] smiling, when he said that?
> [Mr. Spray:] No, ma'am.
> [The State:] Did you think [Mr. Huwe] was joking, when he said that?

2 RP (Aug. 21, 2007) at 107. Mr. Huwe did not object to these questions.

Second, Mr. Huwe points to the State's questioning of Mr. Spray:

> [The State:] Beside [sic] idle chitchat, did [Mr. Huwe] tell you anything else?
> [Mr. Spray:] Yes. She said that she was back in Dayton because of her boyfriend's suicide.

2 RP (Aug. 21, 2007) at 106. Mr. Huwe did not object to this question.

Third, Mr. Huwe points to the State's questioning of Captain Franklin:

> [The State:] Did you ask [Ms. Donohue] what her address was?
> [Captain Franklin:] Yes, I did.
> . . . .
> . . . [s]he said, "St. Mary's."
> [The State:]. . . And technically, she was at St. Mary's?
> [Captain Franklin:] Yes, she was.
> [The State:] And, so, in the letter of your question to her, she right then was residing at St. Mary's. So, technically that was correct.

4 RP (Aug. 22, 2007) at 242. Mr. Huwe did not object to this questioning.

Assuming prosecutorial misconduct occurred, for argument's sake, Mr. Huwe has not met the showing required for prosecutorial misconduct raised for the first time on appeal. *See O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336). The challenged questions are a small portion of the testimony which occurred within four days of testimony. A "curative instruction would have obviated the prejudice it engendered." *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336).

Further, Mr. Huwe challenges the following question posed by the prosecutor to Mr. Spray: "[w]ithout talking about any response or any further comment . . . did [Mr. Huwe] say anything else to you about any plans he had, perhaps?" 2 RP (Aug. 21, 2007) at 106. Mr. Huwe argues this question was prejudicial, because it allowed the jury to consider other acts in deciding the case against Mr. Huwe. However, no other acts were elicited by the prosecutor. Mr. Spray did not answer the question; Mr. Huwe's objection to the question was sustained. Hence, no misconduct occurred. *Cf. State v. Boehning*, 127 Wn. App. 511, 519-23, 111 P.3d 899 (2005) (prosecutorial misconduct occurred, where, in closing argument, the prosecutor argued regarding uncharged crimes).

Third, Mr. Huwe argues prosecutorial misconduct occurred in a statement in an objection made by the prosecutor. However, a curative instruction would have eliminated any prejudice the statement created. *See O'Donnell*, 142 Wn. App. at 328. Accordingly, no misconduct occurred.

Fourth, Mr. Huwe argues the State in rebuttal closing argument improperly commented on his pretrial silence; "what kind of person calls for an ambulance? . . . it's

the kind that won't give his name, will say it doesn't matter who did this." 8 RP (Aug. 24, 2007) at 614-15. Mr. Huwe did not object. "The State may not elicit comments from witnesses or make closing arguments relating to a defendant's silence to infer guilt from such silence." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996).

Even assuming this statement was misconduct, Mr. Huwe cannot raise the issue for the first time on appeal; a "'curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336).

Finally, Mr. Huwe argues the prosecutor elicited testimony in violation of the trial court's pretrial rulings. First, Mr. Huwe points to the following questioning of Ms. Donohue by the prosecutor, referring to the gun used in the crimes:

> [The State:] What .38 Special?
> [Ms. Donohue:] The .38 Special that I had, ah, borrowed from Mr. Dean Krouse.
> [The State:] When did you borrow the .38 Special?
> [Ms. Donohue:] Ah, probably a month before this incident occurred.
> . . . .
> [The State:] And, ah, why did you borrow it?
> [Ms. Donohue:] I was afraid for my safety.
> [The State:] Who were you afraid of?
> [Ms. Donohue:] Mr. Huwe.
> . . . .
> [The State:] And is this the gun you referred to that you borrowed for protection from [Mr. Huwe]?
> [Ms. Donohue:] That's correct.

1 RP (Aug. 21, 2007) at 25-27. Mr. Huwe did not object. The prosecutor did, however, prior to trial, seek to admit evidence of Ms. Donohue borrowing the gun, and the trial court excluded the evidence.

Even assuming prosecutorial misconduct, it does not rise to the level of being reviewable on appeal. It cannot be said that "'the misconduct was so flagrant and ill intentioned that no curative instruction would have obviated the prejudice it engendered.'" *O'Donnell*, 142 Wn. App. at 328 (quoting *Munguia*, 107 Wn. App. at 336). Any prejudice would have been eliminated by instructing the jury not to consider the evidence in support of the charged crimes.

In addition, prior to trial, the trial court excluded explicit mention of the first trial. Mr. Huwe argues the prosecutor committed misconduct when she asked Ms. Donohue if she recalled when pictures of her bullet wound were taken, and Ms. Donohue responded, "[t]hose were taken prior to the first trial." 1 RP (Aug. 21, 2007) at 37. Mr. Huwe did not object to this question. This was not misconduct; the prosecutor did not mention the first trial, or elicit such a response from Ms. Donohue. Regardless, a curative instruction would have eliminated any prejudice created. *See O'Donnell*, 142 Wn. App. at 328.

5. Ineffective Assistance. Mr. Huwe contends defense counsel was ineffective on two grounds: first, eliciting testimony in violation of the trial court's pretrial rulings; and second, failing to object to the admission of booking room photographs.

To establish ineffective assistance of counsel, Mr. Huwe must show his attorney's performance fell below an objective standard of reasonableness and that the deficiency prejudiced him. *McFarland*, 127 Wn.2d at 334-35. Prejudice requires a showing that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Mr. Huwe first points to questioning by defense counsel of Ms. Donohue regarding how she obtained the gun used in the crimes. On cross-examination, defense counsel asked Ms. Donohue when she borrowed the gun, and if she told Mr. Krouse why she wanted a gun. Thus, this questioning addressed evidence excluded by the trial court.

Assuming this line of questioning was deficient performance, Mr. Huwe cannot establish prejudice. Given the ample evidence implicating Mr. Huwe, it cannot be said that the outcome would have been different but for this questioning. *See McFarland*, 127 Wn.2d at 335. Accordingly, defense counsel was not ineffective.

Next, Mr. Huwe argues defense counsel was ineffective for failing to object to admission of booking room photographs. Specifically, he argues defense counsel should have objected to a photograph of him where he was handcuffed to a chair. He also argues ineffective assistance from defense counsel pointing out this fact, by asking, "[b]ut in this picture he is apparently wearing handcuffs; is he chained to the chair?" 4 RP (Aug. 22, 2007) at 292.

Again, assuming the failure to object to this photograph, and questioning the witness regarding the restraints was deficient performance, Mr. Huwe cannot establish prejudice. Given the evidence presented, it cannot be said the outcome would have been different had the jury not been exposed to this evidence. *See McFarland*, 127 Wn.2d at 335. Accordingly, Mr. Huwe cannot establish ineffective assistance of counsel.

6. Cumulative Error. Mr. Huwe contends the doctrine of cumulative error requires reversal. The cumulative error doctrine applies where "there have been several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). However, when no prejudicial error is shown, as here, cumulative error could not have deprived the defendant of a fair trial. *State v. Stevens,* 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Brown, J.

WE CONCUR:

Schultheis, C.J.

Sweeney, J.